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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-514

JOE VEGA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	14
CERTIFICATE OF SERVICE	14
APPENDIX	A-1

TABLE OF CASES

CASES	Page
Beverly v. United States, 5 Cir., 1972, 468 F.2d 732	12
Goldberg v. United States, 472 F.2d 513, 2 Cir., 1973	8
Piemonte v. United States, 367 U.S. 556, 81 S.Ct. 1720	11
United States v. Alter, 482 F.2d 1016, 9 Cir., 1973	8
United States v. Briggs, 5 Cir., 1975, 514 F.2d 794	12
United States v. Minker, 350 U.S. 179, 76 S.Ct. 281 (1956)	8
United States v. Scully, 255 F.2d 113	9

AUTHORITIES CITED

	Page
Public Law 91-452, Title V, Section 501-104	11
The Yale Law Journal Vol. 82	10
United States Code, Title 18, Section 6001-6005	3, 4, 7
United States Code, Title 28, Section 1826	2, 7
Fifth Amendment to the Constitution of the United States	4

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The Petitioner, JOE VEGA, JR., petitions that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit affirming an Order of the District Court adjudging Joe Vega, Jr., to be in civil contempt for his refusal to testify before a Federal Grand Jury.

OPINIONS BELOW

The Order of the District Judge and the opinion of the Court of Appeals, not yet reported, appear in the Appendix hereto.

JURISDICTION

The Judgment of the Court of Appeals was entered September 3, 1975. No rehearing was requested. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether it is an abuse of the power of the Grand Jury and a violation of Mr. Vega's Fifth Amendment rights to Due Process of Law and his privilege against self-incrimination to compel him to testify before the Grand Jury when he is a target-potential Defendant in the investigation being conducted?

2. Whether a target-potential Defendant, who has been granted use immunity, but who fears for the physical safety of himself and his family, if he testifies, may be incarcerated for civil contempt for failure to testify?

3. Whether the Court abused its discretion in failing to grant a reasonable continuance to allow Petitioner to adequately prepare for the civil contempt hearing?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE:

> *Title 28, Section 1826,* "(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify . . . the court, upon such refusal, . . . may summarily order his confinement . . . until such time as the witness is willing to give such testimony . . . No period of such confinement shall exceed the life of --

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivilous or taken for delay . . ."

Title 18, Section 6002, "Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to --

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

Title 18, Section 6003, "(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony . . . which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part . . ."

Amendment V, United States Constitution, "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

On June 10, 1975, Agent J. T. Williams served a subpoena on Mr. Vega, which commanded him to appear before the Federal Grand Jury on June 11, 1975, in Tampa, Florida. On June 11, 1975, Mr. Vega appeared before the Grand Jury which was investigating a case involving the passage of counterfeit money. Upon being questioned, Vega invoked his Fifth Amendment privilege against self-incrimination. Subsequent to his appearance before the Grand Jury, Mr. Vega appeared at the Secret Service Office in Tampa, Florida, for the purpose of giving handwriting exemplars. On July 21, 1975, Mr. Vega was served with another subpoena to appear before the Federal Grand Jury on July 23, 1975, in Tampa, Florida. On July 22, 1975, his attorney was

advised to appear with Joe Vega, Jr., at 9:00 a.m. on July 23, 1975, before the District Court Judge for the purpose of the Government's motion to grant Joe Vega, Jr., immunity pursuant to the provisions of Title 18 U.S.C. §6002. Although on July 23, 1975, it was clearly established that Mr. Vega was a target-potential defendant, the motion was granted, over Mr. Vega's objection, which compelled Mr. Vega to give testimony to the Grand Jury. Mr. Vega then appeared before the Grand Jury and refused to answer questions on the grounds of the Fifth Amendment. At the conclusion of Mr. Vega's appearance before the Federal Grand Jury, his attorney was advised that a hearing had been scheduled for later that same day on a Petition for Rule to Show Cause why Mr. Vega should not be held in contempt of Court for refusing to answer questions before the Grand Jury.

Later the same day, a hearing was held before the District Court Judge pursuant to the Petition filed by the Government at which time his attorney requested that the hearing be continued in order that he could be given the opportunity to prepare for the hearing. This request for continuance was denied by the Court. In defending his refusal to testify, Mr. Vega asserted that because he was a "defendant" in the investigation, that it was an abuse of the Grand Jury to compel his testimony before the Grand Jury that had previously investigated matters pertaining to him. In addition, Mr. Vega expressed fear of bodily injury to himself and his family if he testified.

The Court rejected Mr. Vega's position and adjudicated him in civil contempt and sentenced him to confinement. The Court entered a written Order to that

effect, dated July 23, 1975. On August 1, 1975, the Petitioner took his appeal resulting in the opinion now sought to be reviewed.

REASONS FOR GRANTING THE WRIT

The issues in this case are of fundamental importance to the rights of a citizen who as a putative defendant, or target-defendant of a Grand Jury, is called before the Grand Jury for interrogation. The issues are also of importance to the conduct of investigations into alleged criminal activity.

The issues present questions of constitutional importance which may be settled by this Court within the scope of its supervisory power over the administration of criminal justice in the federal courts.

The issues raise significant and recurring problems growing out of the efforts to grant only "use" immunity before a Grand Jury, to citizens who are themselves the "target" of the investigation being conducted by the Grand Jury.

The District Court granted the motion giving Vega use immunity on the morning of July 23, 1975. Upon Vega's refusal to testify, a civil contempt hearing was scheduled and heard in the afternoon of the same date.

Vega's attorney at the commencement of the hearing, requested a two day continuance of the hearing to prepare factually and legally for the hearing. The Court took the request under consideration, but at the conclusion of the hearing, the Court failed to grant any continuance and adjudged Vega to be in civil contempt

of Court pursuant to Section 1826, Title 28 U.S.C. and directed confinement not to exceed the life of the Grand Jury, or eighteen months, whichever first occurs.

During the hearing complex issues of law and fact were raised and determined which also involved issues of constitutional importance.

1. Vega contended he was a target-potential defendant and not an ordinary "witness" as contemplated by the immunity statutes involved herein or as contemplated by Title 28, U.S.C., Section 1826. This section 1826 states in part:

> Whenever a *witness* in any proceeding before . . . any court or grand jury . . . refuses without just cause shown to comply with an order of the court to testify . . . The court, upon such refusal, . . . may summarily order his confinement . . . until such time as the *witness* is willing to give such testimony . . ." (Emphasis supplied)

The doubtful question is whether Vega was a "witness" within the meaning of Section 1826 and within the meaning of Title 18, U.S.C., Sections 6001 through 6005.

In our ordinary use and understanding of language, witnesses and parties are different categories of participants in administrative and judicial proceedings. Yet, those so interested in a proceeding as to be parties do at times give evidence as witnesses.

The word "witness" is patently ambiguous: it can be applied to anyone who gives testimony in a proceeding, although the proceeding involves him as a party,

or it may be restricted to the person who gives testimony in another's case. *United States v. Minker*, 350 U.S. 179, 76 S.Ct. 281 (1956).

In the proceeding below, where it was established that Vega was a target-potential "party", there are doubts whether he was a "witness" within the meaning of the civil contempt procedures which resulted in his confinement.

Such doubts should be resolved in a citizen's favor where loss of life or liberty is at stake. At the very least, the Court should have granted a brief continuance so that counsel and the Court could fully explore the balancing of interests between the public's "right to every man's evidence" as opposed to the citizen's rights not to be illegally confined.[1]

In *Goldberg v. United States*, 472 F.2d 513, (2 Cir., 1973) the court held that the word "witness" in Section 6002 includes a witness before the grand jury, even if he is also a potential defendant at a later trial. Even the *Goldberg* court stated that:

> "We would be greatly troubled by what has happened here if the Government were seeking an indictment of Goldberg from the grand jury before which he is asked to testify." 472 F.2d at page 516.

The situation that would *greatly* trouble the Court in *Goldberg*, existed with Vega but apparently the District Judge was not troubled at all. The Government was not requested to represent to the District Judge, as the Government did in *Goldberg, supra*, that the

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[1] United States v. Alter, 482 F 2d 1016, 9th Cir., 1973

same grand jury before which Vega was directed to answer questions would not be asked to indict Vega.

The unfairness inherent in calling a "target" defendant before a grand jury to claim his privileges has been recognized by other commentators and authorities. The American Bar Association Project on Standards for Criminal Justice in the Standards Relating to the Prosecution Function in Rule 3.6(e) states the following:

> "The prosecutor should not compel the appearance of a witness whose activities are the subject of the inquiry if the witness states in advance that if called he will exercise his constitutional privilege not to testify."

In the commentary thereunder is stated that "such a tactic is unfair in that the very exercise of the privilege may prejudice the witness in the eyes of the grand jury."

In *United States v. Scully,* 255 F.2d 113 (2 Cir., 1955) Judge Medina stated:

> "Indeed, one would suppose that, as a matter of ethics, or fair play or policy, a prosecutor would in all cases refrain from calling as a witness before a Grand Jury any person who is a de jure or de facto an accused."

The possibilities of abuse of grand jury process under these circumstances are obvious. Rather than the grant of immunity being for the purpose of ferreting out other criminal wrongdoers in the matter under investigation the procedures used against Vega could be used to chill the defendant's defense in the trial that will occur after the return of an Indictment that would

most assuredly follow once Vega divulged the testimony that may tend to incriminate.

The prosecutor can discover the content of defendant's expected testimony if he has the temerity to take the stand in his own behalf in a subsequent prosecution. The prosecutor can prepare his cross-examination, and prepare and shape his trial tactics, with the knowledge gained from the discovery of the prospective defendant's basic testimony. The mere fact that the prosecutor can determine, in many cases where this type of "discovery" could be attempted, that the defendant cannot testify, or that certain witnesses cannot be of assistance to the defendant in a future trial can be of assistance in gaining a conviction.

At the very least the District Judge should have considered possible protective devices to assure himself, and Mr. Vega, that the grant of immunity would leave the prosecutorial authorities in substantially the same position as if Vega had claimed the Fifth Amendment privilege.

In addition to the standards proposed in "Standards for Exclusion in Immunity Cases After Kastigar and Zicarelli", *The Yale Law Journal,* Vol. 82 at pages 182-186, the District Judge could also have required an affidavit from the prosecutor to the court, outlining the reasons for granting the immunity to the target-potential defendant.

This Court, in the exercise of its supervisory power in the administration of criminal justice in the federal courts should require such protective steps in a situation such as presented in the case at bar. The failure of the District Judge to even consider alternatives or

to allow a brief continuance to allow alternatives to be proposed was an abuse of discretion.

2. The District Judge failed to exercise any discretion when informed that Vega feared for the physical safety of himself and his family if he were to testify. The Court accepted Vega's representations, but disregarded them in adjudging him guilty of civil contempt. The fact that Vega was a target-potential defendant and that the grant of use immunity can possibly be abused by the prosecution, as outlined above, should have required the Court to conduct further inquiry of the prosecution where actual fear of physical safety is involved.

The Court should have inquired of the Government if the provisions of Public Law 91-452, Title V, Sections 501-504, 84 Stat. 933 were applicable and, if so, if they would be used to protect Vega and his family. If the Government responded that the provisions to protect Government Witnesses would be afforded Vega then these matters should have been explained to Vega.

The summary procedure; the failure to grant a brief continuance; and the abuse of the power of the Grand Jury deprived Vega of due process of law. This Court in *Piemonte v. United States,* 367 U.S. 556, 81 S.Ct. 1720 recognized that such fear as expressed by Vega was not a legal excuse from testifying. This Court also recognized, however, that "The Government of course has an obligation to protect its citizens from harm."

The Court could have, and should have, explored with Vega, his counsel and the Government, the provisions that Congress has authorized to allow the Gov-

ernment to fulfill this obligation. The summary procedure and the denial of a brief continuance to allow counsel to research these possibilities prevented such an exploration.

In *Beverly v. United States,* 5th Cir., 1972, 468 F.2d 732, the Court rejected the argument that potential defendants could be called before a Grand Jury but could not be compelled to testify on the theory that the testimony of the immunized witness-potential defendant could not be disregarded by the Grand Jury in their deliberation of evidence presented by other witnesses. The Court stated that many procedural due process safeguards afforded a defendant on trial, are not available to a Grand Jury witness. The Court reasoned that "their protection at a possible trial is another matter, for another day."

Should the Grand Jury and the prosecuting attorney be allowed to incarcerate a defendant today and leave for tomorrow his defense to those allegations?

Mr. Vega has been placed in the unenviable position of being subpoenaed to testify before the Grand Jury when he has been previously advised that he is not just a witness, but rather a potential defendant. Admittedly, at this point, Mr. Vega had not been charged by criminal indictment. However, he has lost his job and his liberty because he did not wish to testify against himself. Mr. Vega's reputation and good name have been seriously impaired without giving him the opportunity to defend against the accusations of the prosecuting attorney and the Grand Jury. In *United States v. Briggs,* 5th Cir., 1975, 514 F.2d 794, the Court rejected the contention of the Government that the

Grand Jury could name persons as co-conspirators in an indictment without charging those persons in the indictment. The Court stated that this precluded an opportunity for the petitioners to defend against the accusations made against them and as such was a denial of due process and an abuse of the Grand Jury power. It is submitted in the case at bar that through the statements of the prosecuting attorney and the investigating agent that the Grand Jury was satisfied that they had sufficient evidence to indict the defendant on the crime under investigation and therefore, it was an abuse of the Grand Jury power to seek an Order from the Court compelling testimony from the potential defendant, Vega. The Grand Jury has accused Vega of a crime without affording him a forum in which to vindicate himself.

The procedures followed by the prosecution "smacks" of entrapping Vega to either (a) jeopardize his and his family's safety and, in addition, incriminate himself before the very Grand Jury that has already determined him to be the target-potential defendant; (b) commit perjury, thereby subjecting himself to additional charges; or (c) remain silent and be confined for civil contempt.

Most, if not all, of the policies and purposes of the privilege against self-incrimination are defeated when a witness can be whipsawed in such fashion.

The District Judge failed to even consider ameliorating procedures to assist Vega opting for giving testimony. The prosecutor was not even compelled to reduce all evidence he had in hand, before the grant of immunity, to certifiable form. The Court "summarily" incarcerated him.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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Attorneys for Joe Vega, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Petition for Writ of Certiorari, have been furnished, by Air Mail, Postage Prepaid, to the Solicitor General, Department of Justice, Washington, D. C. 20530, on this 2nd day of September, 1975.

Attorney

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-3086
Summary Calendar*

IN RE: GRAND JURY PROCEEDINGS
UNITED STATES OF AMERICA,
Appellee,

vs.

JOE VEGA, JR.,
Appellant.

Appeal from the United States District Court for the Middle District of Florida

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(Sepember 3, 1975)

BEFORE COLEMAN, AINSWORTH and SIMPSON, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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* Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409.

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 75-100-Misc. T

IN RE GRAND JURY PROCEEDINGS

ORDER

This cause came on for consideration on the Federal Grand Jury's Petition for Rule to Show Cause why Joe Vega, Jr., an immunized Grand Jury witness, should not be held in contempt of Court by his refusal to fully answer questions asked of him before said Grand Jury relying on Title 28, United States Code, Section 1826.

On July 23, 1975, Joe Vega, Jr. appeared before the undersigned and, pursuant to 18 U.S.C., Section 6002, an Order was entered directing Joe Vega, Jr. to give testimony or provide other information to the Federal Grand Jury No. 75-1 meeting in Tampa, Florida. Subsequently, on that same date, Vega did appear before that Grand Jury and refused to answer questions propounded to him relying on his privilege against self incrimination. Immediately thereafter the Grand Jury, by and through the United States Attorney, moved the Court to hold Vega in contempt because of his refusal to testify.

The Court, having considered the Motion, having held a hearing, and having heard argument of counsel, finds that Joe Vega, Jr. did refuse to testify before the Grand Jury after being given immunity under Title 18, United States Code, Section 6002, and therefore he may not refuse to testify based on his privilege against self incrimination.

Therefore, based on the foregoing it is

ORDERED AND ADJUDGED

That Joe Vega, Jr. is in civil contempt of this Court.

It is further

ORDERED AND ADJUDGED

That, pursuant to Title 18, United States Code, Section 1826, that Joe Vega, Jr. be and is hereby placed in the custody of the United States Marshal to be placed in a suitable place of confinement until such time as Joe Vega, Jr. is either: (1) willing to give such testimony or provide such information; or (2) until the term of Federal Grand Jury No. 75-1 expires; but under no condition shall such confinement exceed eighteen months.

DONE AND ORDERED at Tampa, Florida, this 23 day of July, 1975.

/s/ Ben Krentzman

BEN KRENTZMAN
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-514

JOE VEGA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a "target-potential defendant" cannot be called before a grand jury, given immunity and ordered to give testimony. He also contends that fear for the safety of oneself and family should be a defense to a charge of civil contempt for failure to testify under a grant of immunity.

In June 1975, petitioner was subpoenaed to appear before a federal grand jury in Tampa, Florida, investigating counterfeiting offenses. Petitioner appeared but refused to testify, invoking the privilege against self-incrimination. Thereupon petitioner was granted "use" immunity under 18 U.S.C. 6002. He refused, nevertheless, to answer any questions except to give his name. Petitioner was adjudged in civil contempt and was ordered confined for the grand jury's term or until he agreed to testify.[1] The court of appeals affirmed without opinion.

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[1]Petitioner is presently incarcerated. The grand jury will expire in July 1976.

1. Since "'the public * * * has a right to every man's evidence,'" *Branzburg* v. *Hayes*, 408 U.S. 665, 688, any person may be called before the grand jury to give testimony. A grant of "use" immunity is co-extensive with the privilege against self-incrimination and the person given such immunity cannot refuse to testify on a claim of the privilege. *Kastigar* v. *United States*, 406 U.S. 441.

Petitioner argues that a "putative defendant" should be excepted from the "use" immunity provision. But the purpose of that immunity is to compel persons who have evidence of criminal violations, often involving themselves, to present that evidence to the grand jury.[2] Such an exception would seriously narrow the grand jury's authority and create a category of totally immune persons not contemplated by 18 U.S.C. 6002.[3]

2. Petitioner also argues that fear for one's personal safety should be a valid defense to a civil contempt

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[2]Petitioner's argument that "putative defendants" who testify are not witnesses (Pet. 7) is unsound. A witness by definition is one who testifies.

[3]Petitioner contends that he should have been granted a continuance so that he could prepare for the civil contempt hearing. While petitioner mentioned the denial of the continuance in his court of appeals brief, he did not raise the denial as an issue for review. It is therefore not properly before this Court. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2.

In any event, there was no abuse of discretion in denying the request for a continuance. Petitioner made no showing why a continuance was necessary prior to the civil contempt hearing, where the only issue was whether petitioner refused to testify. As the trial judge noted, prior to his grand jury appearance petitioner knew that he had been given "use" immunity (Tr. 5).

conviction for refusal to testify under a grant of "use" immunity. The Court rejected this precise claim in *Piemonte* v. *United States,* 367 U.S. 556, 559, n. 2, holding that fear for personal safety is not a valid excuse for refusing to testify.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.